(1) Supreme Court, U.S.
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No. _____

IN THE
Supreme Court of the United States
October Term, 1994

WILLIAM M. GURLEY,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

I.

MAY THE COURT OF APPEALS FOR THE EIGHTH CIRCUIT CONSIDER THE MIXED QUESTIONS OF LAW AND FACT, RAISED FOR THE FIRST TIME AT THE APPELLATE LEVEL, REGARDING WHETHER THE PETITIONER WAS SUED UNDER 42 U.S.C. §9607(a) IN AN INDIVIDUAL CAPACITY, RATHER THAN IN HIS CORPORATE CAPACITY; AND REGARDING THE EXISTENCE OF PRIVITY BETWEEN THE PETITIONER AND HIS CO-DEFENDANT, GURLEY REFINING CO., INC.?

II.

ONCE HAVING CONSIDERED THE QUESTIONS OF THE CAPACITY IN WHICH THE PETITIONER WAS SUED (PERSONALLY OR IN A CORPORATE CAPACITY), AND THE EXISTENCE OF PRIVITY BETWEEN THE PETITIONER AND HIS CO-DEFENDANT, GURLEY REFINING CO., INC., DOES THE RESOLUTION OF THOSE QUESTIONS UPON THE MERITS AT THE APPELLATE LEVEL CONSTITUTE AN UNACCEPTABLE EXERCISE OF THE COURT OF APPEALS' JURISDICTION WHEN NO SPECIAL CIRCUMSTANCES ARE PRESENT TO COMPEL SUCH RESOLUTION AND WHEN AN INTERESTED PARTY HAS NOT BEEN AFFORDED THE OPPORTUNITY TO PRESENT EVIDENCE ON THE ISSUES RESOLVED?

LIST OF PARTIES

The petitioner herein is William M. Gurley, and the respondent is the United States of America.[1]

LIST PURSUANT TO RULE 29.1

The petitioner is an individual without any relationships which come within the purview of Rule 29.1.

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[1] Other entities who are not petitioners herein but were defendants in the U. S. District Court were Gurley Refining Co., Inc. (dismissed on appeal), Larry Gurley, Gurley Refining Company (a partnership) (dismissed by the respondent with prejudice), Betty Gurley (dismissed by the respondent with prejudice) and R. A. Caldwell (dismissed by way of compromise at the commencement of the trial of this cause).

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PETITION FOR WRIT OF CERTIORARI
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PETITION FOR A WRIT OF CERTIORARI

Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Eighth Circuit entered in this case on December 28, 1994.

OPINIONS BELOW

The pretrial opinion and order of the District Court that granted partial summary judgment to the respondent and against the petitioner is unreported and is

reproduced in the Appendix at A-30.[2] The subsequent opinion of the District Court resulting from the trial of this cause is reported at 788 F.Supp. 1473 and is reproduced at A-52. The opinion of the Court of Appeals is reported at 43 F.3d 1188 and is reproduced at A-1. The Order of the Court of Appeals denying rehearing is unreported and is reproduced at A-83.

JURISDICTION

The judgment of the District Court was entered April 29, 1993. A-82.[3] The judgment of the Court of Appeals was entered December 28, 1994. A-1. A timely petition for rehearing was denied on March 9, 1995. A-83. This Court has jurisdiction pursuant to 28 U.S.C. §1254(1) to review by writ of certiorari the judgment of the United States Court of Appeals for the Eighth Circuit which is the subject of this petition. The District Court possessed jurisdiction pursuant to 42 U.S.C. §9613(b).

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[2] References herein to "A-" are to the separately bound appendix filed herewith; to "R." to the record in the Appellees' Appendix in the Court of Appeals.

[3] The separate opinion of the district court issued March 27, 1992, and found at A-52, was not a final judgment; thus entailing the Amended Judgment of April 29, 1993.

STATUTES INVOLVED

1. CERCLA Section 107(a), 42 U.S.C. §9607(a):

> Notwithstanding any other provision or rule of law, and subject only to the defenses set forth in subsection (b) of this section—
>
> (1) the owner and operator of a vessel or a facility,
>
> (2) any person who at the time of disposal of any hazardous substance owned or operated any facility at which such hazardous substances were disposed of,
>
> (3) any person who by contract, agreement, or otherwise arranged for disposal or treatment . . . of hazardous substances owned or possessed by such person, by any other party or entity, at any facility . . . owned or operated by another party or entity and containing such hazardous substances . . . shall be liable for—
>
> . . .

2. CERCLA Section 101(21), 42 U.S.C. §9601(21):

> The term "person" means an individual, firm, corporation, association, partnership, consortium, joint venture, commercial entity, United States

Government, State, municipality, commission, political subdivision of a State, or any interstate body.

3. CERCLA Section 101(20)(A), 42 U.S.C. §9601(20)(A):

> The term "owner or operator" means . . . (ii) in the case of an onshore facility or an off-shore facility, any person owning or operating such facility. . . .

STATEMENT

The petitioner herein, from 1960 through the present time, was and is the president, director, chief executive officer, and majority stockholder of a closely held corporation known as Gurley Refining Co., Inc. (hereinafter "GRC"). GRC, during the sixties and seventies, engaged in the rerefining of used oil. That operation produced as a by-product a residue of oily waste, which was disposed of at a facility near Edmondson, Arkansas, between 1970 and 1975, under a permit from the State of Arkansas.[4] The disposal operation was terminated by GRC in 1975. Subsequent to the termination of the disposal operation and during the period of time between 1978 and 1979, rains and floods caused the waste in the facility to overflow into the surrounding area and the waters of the United States. The respondent reacted to

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[4] The facility had originally been a clay borrow pit owned by R. A. Caldwell. The petitioner negotiated a lease with Mr. Caldwell on behalf of GRC in 1970. A-30 and A-56.

these discharges by way of two cleanup efforts; the second of which was completed in 1979. A-55-59.

Thereafter, on December 12, 1980, the Comprehensive Environmental Response, Compensation and Liability Act of 1980 became law. That Act, as amended, is found at 42 U.S.C. §§9601 *et seq.* ("CERCLA"). The facility described above was designated a National Priorities List site in August of 1983, pursuant to that statute. A-58. Despite the 1978 and 1979 efforts by respondent to remedy the problems at the facility, the respondent continued to consider the facility a problem, notwithstanding the fact that there were no discharges therefrom as late as the trial held by the District Court in 1990. The respondent, in December of 1983, authorized a Remedial Investigation of the site under the auspices of CERCLA. This investigation took place during 1984 and 1985, and resulted in a Feasibility Study being released in April of 1986. Contemporaneously with the Remedial Investigation, the respondent initiated an action in Federal District Court under the Clean Water Act against R. A. Caldwell ("Caldwell") and GRC for response costs incurred by it as a result of the remediation actions of 1978 and 1979. A final judgment was entered in that action against Caldwell and GRC in 1985. The respondent, in 1987, brought the instant action against Larry Gurley, William M. Gurley, Betty Gurley, GRC, Gurley Refining Company (a partnership), and R. A. Caldwell to recover costs associated with that Remedial Investigation and Feasibility Study. A-59-60.

A. Earlier Proceedings

The Edmondson facility and the 1978 and 1979 releases therefrom spawned two legal actions prior to the instant case.. The first was *Caldwell v. Gurley Refining Co., et al.*, 533 F.Supp. 252 (E.D. Ark. 1982), *aff'm on other grounds, Caldwell v. Gurley Refining Co.*, 755 F.2d 645 (8th Cir. 1985). The second was the *United States of America v. R. A. Caldwell and Gurley Refining Co.*, No. J-C-83-399, United States District Court, Eastern District of Arkansas, Jonesboro Division. The earlier case brought by Caldwell (owner of the property whereon the site was located) named as defendants in that action not only GRC, but also Larry Gurley, William M. Gurley and the United States. The United States was dismissed through motion practice prior to the trial and Larry Gurley and William Gurley had a verdict directed in their favor at the close of the plaintiff's proof.

The second case was filed by the respondent against R. A. Caldwell and GRC, pursuant to 33 U.S.C. §§1321 *et seq.*, in 1983. The trial of the second case resulted in a judgment being entered on October 30, 1985, finding Caldwell and GRC jointly and severally liable to the respondent for costs incurred by it in responding to the 1978 and 1979 releases at the Edmondson facility. It was this judgment that was relied upon by the Eighth Circuit in its finding that GRC was entitled to the defense of

res judicata in the instant appeal. A-14-20.[5]

B. District Court Jurisdiction, Proceeding, Ruling and Judgment

The respondent filed, on November 18, 1987, a 42 U.S.C. §9607 action against various defendants, including the petitioner, seeking reimbursement of response costs incurred by way of its Remedial Investigation and Feasibility Study of the GRC disposal pit and declaratory relief concerning liability for future costs. A-84. The District Court exercised exclusive original jurisdiction of this action pursuant to the provisions of 42 U.S.C. §9613(b). The respondent relied exclusively upon the 1978 and 1979 releases to justify its complaint. The complaint described petitioner as president and principal shareholder of GRC and, as such, responsible for the conduct and management of the company's disposal facility. Petitioner filed a timely answer and two amended and supplemented answers (A-94) alleging, among other things, that he was a privy of GRC and was thus entitled to join in the defense of *res judicata* along with that company. On June 29, 1989, respondent filed a motion for partial summary judgment against GRC and the petitioner. A-114. The respondent additionally sought to have the District Court dismiss the defense of *res judicata* that had been raised by both GRC and the petitioner. It essentially argued that the previous

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[5]The Circuit Court in its decision noted that the District Court had read the transcript of the 1985 trial. This is indeed a puzzling statement in light of the fact that only fifteen pages of Larry Gurley's testimony in that trial were made available to the District Court. (R. 72-87).

action relied upon as creating *res judicata (United States v. Caldwell, et al.)*, was brought pursuant to 33 U.S.C. §1321 (A-62-63) and that the respondent's second suit to recover costs pursuant to 42 U.S.C. §9607(a) constituted a different "cause of action." The respondent further argued that 42 U.S.C. §9613(g)(2), which allows successive actions to recover further response costs under §9607(a), forecloses any defense of *res judicata*, as it relates to a failure on the part of the respondent to couple an action under 33 U.S.C. §1321 with an action under 42 U.S.C. §9607. Nowhere in respondent's complaint or in its motion for partial summary judgment, or in the District Court's June 14, 1990, decision on such motion, was any question raised as to whether petitioner was a privy of GRC or in what capacity he was sued. Indeed, it is clear from the respondent's pleadings and the District Court's order for partial pretrial summary judgment that both the respondent and the District Court were of the opinion that the petitioner was sued in his corporate capacity. The impact of the June 14, 1990, decision foreclosed both questions from ever arising.

After the District Court denied the availability of the defense of *res judicata* it turned its attention to the question of liability of both defendants under §9607. In particular, it reviewed the pleadings, affidavits of respondent's experts and petitioner's discovery deposition. The District Court came to the conclusion that both GRC and petitioner were liable under §9607 and in particular found that the petitioner was personally liable because he, as president and principal stockholder, participated in the management of GRC (facility). A-42-44.

Thereafter, the trial commenced. After a truncated history of the trial, it was concluded in October of 1990.[6] The first portion of the trial focused upon the question of whether or not Larry Gurley was properly a defendant because of his employee status and his lack of control over the corporation.

Thereafter, the question of whether or not the respondent's costs were consistent with the NCP dominated. As previously observed, the District Court's pretrial granting of a partial summary judgment and the denial of the application of *res judicata*, precluded the possibility of petitioner presenting to the Court evidence that would establish his close relationship with GRC (bordering on near identity) at the time of the 1985 trial between the respondent, Caldwell, and GRC. The District Court ultimately entered a Memorandum Opinion and Order on March 27, 1992, which was subsequently amended by way of an Amended Judgment dated April 29, 1993. It was from the latter judgment that Larry Gurley, GRC, and the petitioner appealed to the United States Court of Appeals for the Eighth Circuit.

C. Court of Appeals Review Reversing in Part and Affirming in Part

The Court of Appeals reviewed the decision of the District Court below and delivered an opinion on De-

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[6] Prior to the commencement of the trial, the respondent dismissed Betty Gurley and Gurley Refining Company, a partnership, with prejudice. Also at the commencement of the trial, the government entered into a compromise with R. A. Caldwell.

cember 28, 1994, affirming in part and reversing in part. The portion of the Court of Appeals opinion to which this petition is directed occupies less than three pages (see *U.S. v. Gurley*, 43 F.3d 1188, 1197-1199 (8th Cir. 1994)). A-19-21. On appeal petitioner and GRC argued vigorously that the case of *United States v. Caldwell, et al.*, J-C-83-399, Slip Op. (E.D. Ark. October 30, 1985), (A-31-32, 37-38), was a vehicle sufficient to allow both to assert the doctrine of *res judicata* in the District Court. The Court of Appeals agreed that the respondent should have included the CERCLA count in its cause of action in *United States v. Caldwell* and thus held that GRC should be dismissed under the doctrine of *res judicata* because it was a party in that prior action. The Court observed that the respondent's second lawsuit asserted the same cause of action as was asserted in *United States v. Caldwell*, stating in its opinion that the 1983 action and the 1987 action "focused on the same underlying facts." A-16. The Eighth Circuit went on to examine the District Court's holding that the defense of *res judicata* could also be denied because of the express terms of 42 U.S.C. §9613(g)(2). It aptly rejected the reasoning that "EPA may pursue both a CWA action and a CERCLA action to right the same wrong" under the auspices of 42 U.S.C. §9613(g)(2). A-17.

After the Court held that the defense of *res judicata* was available to GRC, it then addressed two questions raised for the first time by the respondent in its appellate brief. The first question was whether petitioner was a privy of GRC. The second question was whether the respondent had sued the petitioner individually or in his corporate capacity as president and dominant stockholder of GRC. (An adjunct to this latter question was whether

the District Court, in its June 14, 1990 Order, had found petitioner liable in his individual capacity or, alternatively, in his corporate capacity.)[7]

Assuming, for the sake of argument, that, in addressing the two legal questions described above, the Circuit Court was not violating the teachings of *Singleton v. Wulff*, 428 U.S. 106 (1976), and *Hormel v. Helvering*, 312 U.S. 552 (1941), could it with impunity resolve these questions on the merits without allowing petitioner his day in court and without allowing petitioner to supplement the inadequate record applicable to these questions? The answer to the foregoing questions would seem to be a resounding "no" if *Hormel* and *Singleton* really mean what they say.

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[7] That paragraph in respondent's brief which raises these first-time questions reads as follows:

> Even if the *res judicata* challenge were well-founded, it would only preclude the United States' claim against GRC. William Gurley asserts that he was 'in privity' with GRC when *U.S. v. Caldwell* was decided and is therefore entitled to the same protection as the Corporation. But William Gurley was sued under CERCLA in his personal rather than his corporate capacity. 'This personal liability is distinct from the derivative liability that results from "piercing the corporate veil" where [courts] hold the owners of a less than bona fide corporation responsible for corporate acts.' . . . The extent of his control over GRC's defense in *U.S. v. Caldwell* has no bearing on his liability under CERCLA Section 107(a)(2) for his individual conduct as operator of the Gurley Pit.

(Citations omitted).

The Circuit Court, feeling no jurisdictional qualms, reached the merits of the questions of privity and capacity by merging the two questions. It astonishingly based its finding of lack of privity upon the fact that the respondent had not sued petitioner in his corporate capacity but solely in his individual capacity and further held that the District Court had found him liable in his individual capacity, as opposed to his corporate capacity. The Circuit Court, in effect, proceeded beyond the need to remand to determine the question of privity and in what capacity petitioner was sued. It, therefore, improperly resolved mixed questions of law and fact based upon an inadequate, if not non-existent, record.

The Circuit Court reasoned that since petitioner was sued in the 1987 action as an individual and not as a corporate officer under §9607, he was not in privity with GRC for the purposes of the 1983 action and could not therefore invoke the application of *res judicata.*[8]

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[8]The Court seems to overlook the fact that the threshold question regarding privity is whether the petitioner was a privy of GRC in the 1983 (1985 trial) case. The petitioner, at the very least should have been entitled to have the question remanded so that he could demonstrate, *inter alia,* his participation and control of the first litigation, domination of GRC by way of his presidency, dominant position as stockholder and CEO, and to further demonstrate the fact that he constituted the alter ego of GRC.

REASONS FOR GRANTING THE WRIT

The petitioner's appeal to the Eighth Circuit Court of Appeals contained, *inter alia*, the questions of whether the action brought by the respondent against petitioner and GRC was barred by the doctrine of *res judicata* and whether the District Court erred in granting the respondent's motion for partial summary judgment as to liability. When a circuit court is faced with those questions, it looks to the standard of review by which it is to adjudge the district court's rulings. Essentially, a determination of *res judicata* should revolve around the structure of the pleadings as they relate to the previous case purportedly creating *res judicata* and generally becomes a question of law, as opposed to a question of fact. When circuit courts review the granting of motions for summary judgment, they do so *de novo. United States ex rel., Glass v. Medtronic, Inc.*, 957 F.2d 605, 607 (8th Cir. 1992). As this Court has held, where the record taken as a whole could not lead a rational trier of fact to find for the non-moving party, there is no genuine issue for trial. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986).

The error that has been generated by the Court of Appeals is that subsequent to its determination that the doctrine of *res judicata* was available as a defense to GRC, it treated the question of petitioner's status as a privy of GRC as one that could be decided *de novo* when, in fact, that question, because it was a question of fact, at the very least, should have been remanded to the District

Court for briefing and a hearing on the merits.[9] As the Circuit Court has previously noted, "Who are privies ordinarily presents a question of fact requiring examination of the circumstances of each case as it arises." *Crane Boom Life Guard Co. v. Saf-T-Boom Corp.*, 362 F.2d 317, 322 (8th Cir. 1966), cited with approval in *Towle v. Boeing Airplane Co.*, 364 F.2d 590, 593 (8th Cir. 1966).

The Eighth Circuit below has adopted a seemingly variable standard of review which enables it to reverse *de novo* the District Court's finding that *res judicata* was not available to GRC and then to uphold the District Court's finding of liability against the petitioner, based upon a determination on the merits that the petitioner was not a privy of GRC.[10] This procedural sleight of hand violates the Court's admonition concerning the sanctity of the salutary principle of *res judicata. Federated Dep't Stores, Inc. v. Moitie*, 452 U.S. 394, 401 (1981).

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[9] This assumes, *arguendo,* that the Circuit Court properly allowed the question of privity to be raised at the appellate level.

[10] This determination, of course, was made notwithstanding the fact that the question had never been raised by the respondent below and had never been briefed and argued. Thus, the petitioner was not allowed to demonstrate his " 'close relationship, bordering on near identity' " to GRC. *Headley v. Bacon,* 828 F.2d 1272, 1276 (8th Cir. 1987). Nor was he allowed to establish that as a participating nonparty in the 1983 lawsuit, he had sufficient interest in the litigation between respondent and GRC to be bound by, and to take advantage of, the 1985 judgment in *U. S. v. Caldwell. In re Teletronics Services, Inc.*, 762 F.2d 185 (2d Cir. 1985).

The petitioner suggests in summary, that the Eighth Circuit generally adhered to the standard of review normally applicable to circuit courts when it reviewed the District Court's granting of a partial summary judgment on behalf of the respondent. However, once it determined that GRC should be dismissed from the action below based upon the doctrine of *res judicata*, it created a new playing field relative to the standard of review. On that playing field, the Circuit Court, having already determined that the first (1983) suit and the second (1987) suit contained the same cause of action, then took it upon itself to determine if the petitioner was a privy of GRC and thus entitled to invoke the protections afforded by the doctrine of *res judicata*. The issue of privity had never been addressed by the District Court; it had reasoned that even GRC, the party with which petitioner claimed to be in privity, was not entitled to invoke the doctrine of *res judicata* because (1) the two actions were not the same since each sought damages for costs incurred during different time frames and under different statutes, and (2) 42 U.S.C. §9613(g)(2) permitted successive actions to be brought to recover response costs or damages. See 788 F.Supp. at 1479. A-17. By deciding the question of privity upon the merits, the Circuit Court engaged in what this Court has characterized as an unacceptable exercise of its appellate jurisdiction. *Singleton, supra*, at 120.

Petitioner does not request this Court to resolve earthshaking matters of constitutional law but does urge that this Court resolve a question of fundamental fairness under law, *i.e.*, may a circuit court, through the abuse of

procedure and standard of review, circumvent this Court's mandates as to the doctrine of *res judicata.*

I. A. THE EIGHTH CIRCUIT'S TAKING UP FOR THE FIRST TIME ON APPEAL THE QUESTION OF THE EXISTENCE OF PRIVITY, IN THE ABSENCE OF ANY SPECIAL CIRCUMSTANCES, CONFLICTS WITH THIS COURT'S DECISIONS IN *HORMEL V. HELVERING* AND *SINGLETON V. WULFF.*

B. THE EIGHTH CIRCUIT'S TAKING UP FOR THE FIRST TIME ON APPEAL THE QUESTION OF WHETHER THE RESPONDENT SUED THE PETITIONER IN HIS CAPACITY AS PRESIDENT AND PRINCIPAL SHAREHOLDER OF GURLEY REFINING CO., INC. AND WHETHER THE DISTRICT COURT IMPOSED LIABILITY UPON THE PETITIONER IN HIS CAPACITY AS PRESIDENT AND PRINCIPAL SHAREHOLDER, IN THE ABSENCE OF SPECIAL CIRCUMSTANCES, CONFLICTS WITH THIS COURT'S DECISIONS IN *HORMEL V. HELVERING* AND *SINGLETON V. WULFF.*

The petitioner addresses both parts A and B of I above in a single argument. The Eighth Circuit, in reaching its decision relative to the petitioner, accepted the respondent's argument (which was, as previously noted, advanced for the first time in one page of respondent's appellate brief) that if GRC was afforded the defense of *res judicata*, the petitioner was not a privy of GRC be-

cause he was sued in his individual, not corporate, capacity and therefore was not entitled to invoke the protections afforded by the doctrine of *res judicata.*

Because the District Court had no reason to look to the question of privity nor did the respondent have any reason to argue that privity did not exist while urging its motion for partial summary judgment to the District Court, these matters were not confronted in petitioner's appellate brief. It was only at the time that the respondent focused on the overwhelming law enunciated by this Court *(Brown v. Felsen,* 442 U.S. 127, 138. n 10 (1979); *Montana v. United States,* 440 U.S. 147, 154 (1979); *Parklane Hosiery Co. v. Shore,* 429 U.S. 322, 327 n 5 (1979); *United States v. Southern Ute Tribe or Band of Indians,* 402 U.S. 159, 162, 174 (1971)), relative to the parameters of *res judicata,* that it commenced to search for other legal arguments so as to foreclose the petitioner from successfully asserting that defense. This Court has observed that:

> Ordinarily an appellate court does not give consideration to issues not raised below. For our procedural scheme contemplates that parties shall come to issue in the trial forum vested with authority to determine questions of fact. This is essentially in order that parties may have the opportunity to offer all the evidence they believe relevant to the issues which the trial tribunal is alone competent to decide; it is equally essential in order that litigants may not be surprised on appeal by final decision of issues upon which they have had no opportunity to introduce evidence.

Hormel v. Helvering, supra at 556.

The Court revisited the general rule expressed in *Hormel* in the case of *Singleton v. Wulff, supra,* noting that:

> The matter of what questions may be taken up and resolved for the first time on appeal is one left primarily to the discretion of the courts of appeals, to be exercised on the facts of individual cases. We announce no general rule. Certainly there are circumstances in which a federal appellate court is justified in resolving an issue not passed on below, as where the proper resolution is beyond any doubt, . . . or where 'injustice might otherwise result.' . . . Suffice it to say that this is not such a case. The issue resolved by the Court of Appeals has never been passed upon in any decision of this Court. This being so, injustice was more likely to be caused than avoided by deciding the issue without petitioner's having had an opportunity to be heard.

428 U.S. at 121, citations omitted.

The Court appears to be saying that if the Court of Appeals addresses and resolves a question for the first time on appeal, it must properly find special circumstances to allow it to bypass the general rule enunciated in *Hormel.*[11]

Prior to its decision below, the Eighth Circuit had faithfully followed the mandates of *Hormel* and *Singleton.*

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[11] See, also, the case of *Commissioner v. McCoy,* 484 U.S. 3, 6 (1987), wherein this Court disposed of a petition through a summary *per curiam* opinion, the facts of which are very similar to the instant case. Additionally, it should be a matter of great interest to this Court that based upon a careful reading of the record, no special circumstances could possibly have existed.

In the case of *Stafford v. Ford Motor Company*, 790 F.2d 702 (8th Cir. 1986), the Circuit acknowledged that the general rule is that a federal appellate court will not consider issues not passed upon below, citing as authority *Singleton v. Wulff*. The Court observed that the rationale of the rule is twofold:

> First, the record on appeal generally would not contain the findings necessary to an evaluation of the validity of an appellant's arguments. *[St. Louis Developmental Disabilities v. Mallory*, 767 F.2d 518 (1985)] *Mallory*, 767 F.2d at 521. Second, there is an inherent injustice in allowing an appellant to raise an issue for the first time on appeal. A litigant should not be surprised on appeal by a final decision there of issues upon which they have had no opportunity to introduce evidence. *Hormel v. Helvering*, 312 U.S. 552, 556, 61 S.Ct. 719, 721, 85 L.Ed. 1037 (1941). A contrary rule could encourage a party to 'sandbag' at the district court level, only then to play his 'ace in the hole' before the appellate court.

790 F.2d 706.

The *Stafford* Court, quoting *Singleton*, observed that courts of appeals have discretion with regard to questions taken up and resolved for the first time. It noted that an appellate court is "justified" in considering an issue whose "proper resolution is beyond any doubt" or " 'where injustice might otherwise result,' " quoting *Hormel, supra*, at 557. A subsequent Eighth Circuit case enlarged upon reasons to consider an issue for the first time at the appellate level by observing an issue may be considered if it was a legal question that had been fully briefed and argued by the parties. *Estate of Vak v. Com-*

missioner of Internal Revenue, 973 F.2d 1409, 1412 (8th Cir. 1992).[12]

The Eighth Circuit in its decision enunciated no special circumstances in the instant case to enable it, for the first time, to address the questions of privity and capacity. As indicated in footnote 11 above, none existed. There was no constitutional question present whose answer was obvious. There was no miscarriage of justice which would otherwise result from the appellate court not acting as a district court regarding findings of fact, nor were the legal questions addressed by the Circuit Court ones that had been fully briefed and argued by the parties. To be sure, the greatest apparent injustice present in this case was created by the Eighth Circuit through its fundamentally unfair denial of the petitioner's day in court, which resulted in his becoming responsible for a money judgment in excess of $1.7 million plus interest, as well as a declaratory judgment against him for future response costs estimated to be in excess of $6 million. A-59, A-77.

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[12]This Court also appears to have created an exception for criminal cases when it noted that "The Court of Appeals recognized that it need not ordinarily consider grounds of objection not presented to the trial court." (Citing *Hormel.)* The Court went on to say that the above described rule has exceptions, particularly in criminal cases wherein appellate courts can take judicial notice of errors that impinge upon the fairness of the judicial proceedings. *Anderson v. United States,* 417 U.S. 211, 217, n 5 (1974).

II. A. WHEN THE EIGHTH CIRCUIT RULED UPON THE MERITS AS TO WHETHER THE PETITIONER WAS SUED IN A PERSONAL CAPACITY, RATHER THAN A CORPORATE CAPACITY, IN THE INSTANT CASE, IT FORECLOSED PETITIONER FROM PUTTING IN EVIDENCE THAT WOULD HAVE ESTABLISHED HIS CLOSE RELATIONSHIP, BORDERING ON NEAR IDENTITY, TO GRC, AND AS SUCH CONFLICTS WITH THIS COURT'S DECISIONS IN *HORMEL V. HELVERING* AND *SINGLETON V. WULFF.*

B. THE EIGHTH CIRCUIT'S RULING UPON THE MERITS AS TO THE QUESTION OF PRIVITY, AFTER FINDING THAT THE DEFENSE OF *RES JUDICATA* WAS AVAILABLE TO GURLEY REFINING CO., INC., FORECLOSED THE PETITIONER FROM PUTTING INTO THE RECORD PROOF OF PRIVITY WHICH CONSTITUTED AN UNACCEPTABLE EXERCISE OF APPELLATE JURISDICTION IN CONFLICT WITH THIS COURT'S DECISIONS IN *HORMEL V. HELVERING* AND *SINGLETON V. WULFF* AND THE PRINCIPLES OF *RES JUDICATA* ENUNCIATED IN *HEISER V. WOODRUFF.*

This petitioner reiterates that the Eighth Circuit found the respondent had asserted the same claim in this action that it had asserted in the 1983 action. A-19. As was discussed above, the cause of action in the 1983 case and the cause of action in the 1987 case (the instant case)

arose out of the same "nucleus of operative facts." A-15.[13]

The petitioner has previously noted in this petition that the District Court found petitioner's liability (as well as GRC's) to be governed by §9607(a)(2). The Court relied, *inter alia*, on the cases of *United States v. Northeastern Pharmaceutical & Chemical Co.*, 810 F.2d 726, 746 (8th Cir. 1986) *(NEPACCO)*, *cert. denied*, 484 U.S. 848 (1987), and *State of New York v. Shore Realty*, 759 F.2d 1032, 1052 (2nd Cir. 1985). A-42. The fact is that notwithstanding the District Court's reliance upon *NEPACCO* and *State of New York*, *NEPACCO* found individual liability emanating not from §9607(a)(2) but from §9607(a)(3) and *State of New York* noted that the individual in question acquired personal liability as an owner and operator because he was an owning stockholder who managed the corporation. *Id.* at 1052. Neither the two cases above nor the opinion of the District Court below addressed the existence of privity. Thus, none of the three cases stand for the proposition that capacity in which the privy is sued must always be examined in the second case. Certainly the fact that the petitioner was sued under 42 U.S.C.

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[13] One should not lose sight of the fact that the District Court, in interpreting the respondent's action against GRC and petitioner, stated in its June 14, 1990, opinion that:

> The main dispute concerns whether any of the defendants are liable under section 107(a) which provides the categories of parties who are liable. The United States contends that GRC, Inc. and William Gurley are liable as owners and operators under Sections 107(a)(1) and (a)(2).

A-41.

§§9601, *et seq.*, (whether in a corporate or individual capacity) would have no impact on petitioner's right to the defense of *res judicata* if the privity between petitioner and GRC arose because there was near identity between the two or because as a nonparty he had directed and dominated the first litigation.

The apparent flaw in the Eighth Circuit's attempt to use its appellate jurisdiction to factually foreclose the question of privity for the petitioner was that it ignored the question of privity *vis-a-vis* GRC and the petitioner in the first action. One must remember it found the causes of action in both the first and second cases to be the same. It also then assumed that whether or not William M. Gurley enjoyed a relationship bordering on near identity with GRC and whether or not William M. Gurley, as a stockholder, alter ego and nonparty, had participated in and dominated the litigation in the first proceeding, it could reinterpret respondent's pleadings and the District Court's findings in the second proceeding so as to foreclose petitioner's right to the defense of *res judicata.* All of this is in violation of that mandate set out by this Court in *Heiser v. Woodruff*, 327 U.S. 726 (1946), *i.e.*, "no principle of law or equity . . . sanctions the rejection . . . of the salutary principle of *res judicata.*" *Id.* at 733.

This petitioner has previously pointed out that the Circuit Court further rejected the argument that 42 U.S.C. §9613(g)(2) by its operation allowed the respondent to bypass the application of *res judicata* (A-17) and that the Circuit found that GRC was a party to the prior action but that petitioner was not. A-19. The Circuit Court, having made that assessment, did not determine

whether there was a sufficient record before it to reach a mixed question of fact and law as to whether privity existed between GRC and the petitioner in the prior action. The Circuit Court bypassed that obligation in an adroit manner.

The Eighth Circuit addressed petitioner's relationship with GRC and discussed the newly raised issues of privity and in what capacity petitioner was sued (A-19-21), notwithstanding the fact that no true record existed from the District Court below as to those two propositions. The Court noted that "[a] person is in privity with another person if he has ' "a close relationship bordering on near identity." ' *Headley v. Bacon*, 828 F.2d 1272, 1276-79 (8th Cir. 1987)." A-20. Despite that observation and faced with limited findings of fact by the District Court that could very easily be interpreted in favor of the petitioner being an alter ego of GRC, the Eighth Circuit, invoking a *de novo* standard, found as a matter of law that Gurley had no close relationship with GRC. A-20.

Finally, the Court of Appeals examined the capacity in which petitioner had been sued, ostensibly for the purpose of determining whether privity existed in the second suit. This was procedurally improper. As stated above, privity is determined by the relationship of GRC and the petitioner in the first (1983) case. Any examination of the second (1987) case has to be for the purpose of determining whether the causes of action are the same in both cases. The Circuit Court, having found that with regard to the respondent and GRC the causes of action were the same, proceeded to reinterpret the respondent's complaint and the District Court's findings as follows:

> Here, William Gurley is the principal shareholder, the president, and one of two directors of GRC. The only other director and only other shareholder is his wife, Betty Gurley. It is undisputed that the district court imposed liability on him not in his capacity as principal shareholder, president, and director, but as an individual who meets §9607(a)(2)'s definition of 'operator.' Thus, William Gurley is not in privity with GRC and may not assert the defense of *res judicata.*

A-20-21.

In making the foregoing legal conclusion, the Eighth Circuit ignored contrary legal and factual conclusions made by the District Court. It thereupon relied upon a footnote in the case of *Oglala Sioux Tribe v. Homestake Mining Co.*, 722 F.2d 1407 (8th Cir. 1983), (to the effect that directors, officers and shareholders not solely named as such in the second suit cannot claim privity with the corporation) *(Id.* at 410, n 3, A-20-21) to buttress its improper exercise of appellate jurisdiction.[14]

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[14]The Court's reliance on that footnote was clearly misplaced. Footnote 3 to *Oglala Sioux Tribe* stands for the proposition that directors of a corporation, when sued in that capacity, may be in privity with that corporation for the purposes of *res judicata.* It does not stand for the proposition that only such directors sued in such capacity may be in privity. Indeed, there are a number of ways in which a person may be in privity with a corporation, such as a shareholder with sufficient interest in the litigation by the corporation, participating and controlling that litigation, (1B Moore's Federal Practice ¶0.411[6] (2nd Ed. 1974), pp. III-253-254), or by other special relationships between the stockholder and the corporation, as well as the application of "substantial identity of parties." *Id.* at ¶0.411[9], pp. III-267-274.

This apparent legal conclusion (which is in truth a finding of fact) by the Court of Appeals is quite remarkable. One has but to examine the respondent's complaint, its requests for admissions, and the District Court's decision of June 14, 1990, to determine how really remarkable it is.

The complaint filed by the respondent described the petitioner as follows:

> On information and belief, William Martin Gurley, is president of and principal shareholder in Gurley Refining Co., Inc., and partner in Gurley Refining Company. William Gurley, at all times relevant herein, was responsible for the conduct and management of the Gurley site. William Gurley controlled the affairs and activities of Gurley Refining Company, Inc., and Gurley Refining Company.

A-86

This was the only description of the petitioner in the complaint filed by respondent in the second case.

Through requests for admissions in the second suit (A-105), the respondent sought to have William M. Gurley admit that in his "capacity" as president of GRC:

- He sought a site for disposal;
- He leased the site from R. A. Caldwell;
- He was the "operator" of the site as defined at 42 U.S.C. §9601(20)(A);

- He accompanied the driver who "dumped the first truckload of waste" at the site;

- He directed the activities of the employees of GRC;

and so on. A-107-113.

Finally, the District Court, in granting the respondent's motion for partial summary judgment, held " . . . that Gurley is personally liable because as a corporate official and major stockholder he was responsible for the daily management of the Pit and the disposal of hazardous wastes in the Pit." A-44.

Although the District Court did have the benefit of petitioner's discovery deposition, that deposition was not directed toward the question of the capacity in which he was being sued and, because the question of *res judicata* ceased to be a viable defense by the District Court's granting of the motion for partial summary judgment, the petitioner was foreclosed from testifying in the trial of the cause with regard to any legal point other than to question whether the respondent's costs of remediation were consistent with the national contingency plan. Thus, there was no legal way for petitioner to interject the question of privity or in what capacity he was being sued nor had the District Court or the respondent even broached those questions prior to the granting of the partial summary judgment.

The Eighth Circuit, in addressing the question of the capacity in which the petitioner was sued, seems to be taking a position that is contrary to law. As previously stated, the threshold question is whether petitioner was a

privy of GRC when the case of *United States v. Caldwell* was brought and subsequently tried. If that is answered in the affirmative, then it may be proper for the Circuit Court to determine if the petitioner was sued in any capacity other than that which created his privity in the first suit.[15] Certainly the Eighth Circuit below proceeded to manufacture a different capacity in which the petitioner was sued in the District Court as a means of justifying its denial of the petitioner his day in court. This would be in regard to both the question of privity and the question of capacity. As pointed out by this Court:

> We have no idea what evidence, if any, petitioner would, or could, offer in defense . . . , but this is only because petitioner has had no opportunity to proffer evidence. . . .
>
> * * *
>
> The issue resolved by the Court of Appeals has never been passed upon in any decision of this Court. This being so, injustice was more likely to be caused than avoided by deciding the issue without petitioner's having had an opportunity to be

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[15] This statement assumes that the matter of privity as between, in this case, GRC and the petitioner arose because of petitioner's activity as a stockholder, president, director, etc. The cases, such as *Oglala Sioux* and *Headley*, which stand for this examination of capacity, are not necessarily important to cases where privity has been created by a nonparty dominating the litigation in the first instance and by an individual who becomes an alter ego (under the facts of the case) of the corporation that is entitled to the defense of *res judicata*. The citation of *Headley* and *Oglala Sioux* by the Eighth Circuit in support of its finding that no privity exists assumes facts that are neither in the record nor available to that Court in any other fashion.

heard.

> Assuming, therefore, that the Court of Appeals had jurisdiction to proceed to the merits in this case, we hold that it should not have done so. To that extent, its judgment is reversed and the case is remanded with directions that it be returned to the District Court so that petitioner may file an answer to the complaint and the litigation proceed accordingly.

Singleton v. Wulff, supra, at 120-121.

The manner in which the Eighth Circuit decided the questions of privity and capacity on the merits also foreclosed (as previously indicated in footnote 8) petitioner's ability to demonstrate his overall nonparty control of the *United States v. Caldwell* litigation. This is particularly important with regard to petitioner being able to establish an additional reason why he is in privity with GRC. This Court has observed in *Montana v. United States, supra:*

> These interests are similarly implicated when nonparties assume control over litigation in which they have a direct financial or proprietary interest and then seek to redetermine issues previously resolved. As this Court observed in *Souffront v. Compagnie des Sucreries,* 217 U.S. 475, 486-487, 54 L.Ed. 846, 30 S.Ct. 608 (1910), the persons for whose benefit and at whose direction a cause of action is litigated cannot be said to be 'strangers to the cause. . . . [O]ne who prosecutes or defends a suit in the name of another to establish and protect his own right, or who assists in the prosecution or defense of an action in aid of some interest of his own . . . is as much bound . . . as he would be if

he had been a party to the record.'
440 U.S. at 154.

When one couples the teachings of this Court in *Hormel, Singleton* and *Montana* with the analogous authority of *Commissioner v. McCoy, Nevada v. United States,* 463 U.S. 110, 129-132 (1983), and *Fountain v. Filson,* 336 U.S. 681, 683 (1949), it becomes apparent that the Eighth Circuit has ignored this Court's admonition that:

> . . . Quite apart from these considerations, the Court of Appeals' resolution of the merits seems to us to be an unacceptable exercise of its appellate jurisdiction.
>
> As noted, with respect to the complaint's count that is before us, petitioner filed in the District Court only a pre-answer motion to dismiss for lack of standing. . . . In short, petitioner has never been heard in any way on the merits of this case.

Singleton at 119-120.[16]

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[16] *Cf. Thornburg v. American Coll. of Obst. & Gyn.,* 476 U.S. 747, 757, 821 (1986), wherein a majority of this Court recognized the application of *Singleton* but carved out an additional exception that allows a court of appeals to address a matter not addressed below if, *inter alia,* the facts are established or not relevant to the question reviewed. *Id.* at 757. It should be noted that the dissent in that case quoted with authority *Hormel* and *Singleton* and found *Fountain* to be analogous authority. *Id.* at 821. Also, *cf. Kamen v. Kemper Financial Services,* 500 U.S. 90, 100, (1991), wherein this Court, in remanding a matter for consideration by the Court of Appeals, took the trouble to note that despite its position in the instant case, it did not "mean to suggest that a court of appeals should not treat an unasserted claim as waived or that the court has no discretion to deny a party the benefit of fa-

III. SPECIAL AND IMPORTANT REASONS EXIST FOR GRANTING THIS PETITION.

In summary, the petitioner respectfully submits to this Honorable Court that special and important reasons exist for the granting of his petition for a writ of certiorari. It is clear from the foregoing that the Eighth Circuit Court of Appeals has departed so far from the accepted and usual course of judicial proceedings that an exercise of this Court's power of supervision is called for. Notwithstanding the mandate of this Court as contained in *Singleton* and *Hormel*, the Circuit Court has taken upon itself the determination of the issues of privity and capacity upon the merits although no special circumstances existed for such determination and although an insufficient record was before the Court. In so doing, it has deprived the petitioner of his fundamental right to present evidence showing that his relationship to GRC at the time of the 1983 action was such that he, like his alter ego GRC, is entitled to the protections afforded by the doctrine of *res judicata*. By depriving him of the defense of *res judicata*, the Circuit Court has unfairly subjected him to monetary liability approaching $10 million. The petitioner respectfully petitions this Court to issue a writ of certiorari and, because the Eighth Circuit's opinion constitutes a direct rejection of this Court's mandates in *Hormel*, *Singleton* and *McCoy*, petitioner respectfully urges the Court to dis-

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vorable legal authorities when the party fails to comply with reasonable local rules on the timely presentation of arguments. *See* generally *Singleton v. Wulff*, 428 U.S. 106, 121, 49 L.Ed.2d 826, 96 S.Ct. 2868 (1976)...." 114 L.Ed.2d at 166.

pose of this matter through a summary *per curiam* opinion.

Respectfully submitted,

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